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The Menace of Administrative Law (1920)

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THE MENACE OF ADMINISTRATIVE LAW*

GENTLEMEN:—Your President in asking me to address you suggested as the topic "The Deportation of Aliens," a title which I have somewhat broadened for reasons which will be obvious. In these times of excitement it is difficult to give calm consideration to so unpopular a subject as "the rights of aliens." Indignant at the abuse of our hospitality, outraged by acts of violence committeed by aliens to whom we have given refuge, we are as a people not in a mood to listen patiently to a discussion of this character. I know that I speak for all of you as well as for myself when I denounce without qualification the conduct of those particular aliens in this country who, while accepting our protection, are seeking to overthrow with violence the very existence of our government.

But those who deal with the administration of justice must never fail in maintaining its impartial standards and these times of agitation and crisis impose a special duty upon the members of the American Bar.

During the past two or three decades there has been much public comment on the subject of the alleged decline in the prestige of lawyers as leaders of public opinion and it has been popular with the paragraph writers to ask with annoying frequency, "where are the Clays', Sewards', Conklings', Gormans' of the present day?" It must fairly be admitted that for the past quarter of a century the names most prominently before the public have not been in the main the names of lawyer statesmen. The reason for this is not any decline in the importance of the legal profession, but because the importance of the Bar as interpreters of the public conscience has been obscured by discussion of industrial problems rather than the old fundamental questions of human liberty. The media in which the lawyer statesman rose to commanding influence was an atmosphere in which these fundamental questions of human liberty were sharply defined and frequently brought to an issue. With a rapidly developing industrial civilization the nature of the problems affecting the public have changed. The leading men of our communities have been the business titans, the industrial geniuses; questions before the courts and likewise before the legislative bodies have been questions arising out of complicated social conditions accompanying the rise of an industrial civilization; questions of human liberty have been interwoven into questions of property rights and greatly obscured by the latter. More and more the arguments before our courts have dealt with interpretations of contracts and interpretation of statutes,—less and less we are hearing of the

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old doctrines of the common law. One distinctly evil result of this general tendency has been that the average citizen has lost interest in the constitutional history of his government; to him the origins of the Constitutional Guarantees have been becoming more and more remote and even our public school graduates and college graduates have an inadequate knowledge of the essentials of our government and only a vague conception of the long and slow evolution of government by public opinion.

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It was inevitable that during the war . . . democracy should submit itself to the exercise of autocratic powers in the hands of Federal administrators. The same was true of the people of Great Britain and of France. The food regulation; the fuel control; the war taxation; the operation of the railroads; the adjustment of claims against the government on informal contracts, brought into existence a new bureaucracy which fixed standards, disposed of property rights and in the field of revenue interpreted the laws of Congress solely through the mouth-piece of administrative officials. And by a well recognized legal fiction pertaining to executive acts the decisions of all these officials, their jurisdiction being admitted, was practically non-reviewable by the Courts of the land. The emergency of the war made people acquiescent in the exercise of these powers, but the war has now been over and done with for nineteen months and most of these executive powers are still in operation. Unconsciously and to the point of danger the public has become habituated to the existence of a great and still growing body of law and regulation lying entirely outside the field of judicial adjudication and as a people we have unconsciously and uncritically passed into the control of continental theories of administrative law alien to our jurisprudence and at variance with our theory of constitutional government. This condition has been fostered by the desire on the part of the general public for efficient short cuts to quick results. They know little of the origin of the constitutional guarantees, are impatient of the law's delays, and have little interest in what they call abstract theories of government. . . .

The enforcement of administrative law in the fields adverted to has chiefly affected property rights. But recent events have startled some of us with a realization of genuine danger to the American conception of individual liberty in the enforcement of the so-called deportation statutes. In this field of governmental activity we have had illustrated most vividly the menace of administrative law.

During the five months beginning November 1st, 1919—chiefly during the early part of January—some anonymous subordinate administrative official at Washington, acting in the name of the Secretary of Labor and proceeding under the Immigration Act, . . . authorized by telegraph orders for the arrest of no less than 6,350 persons; and 3,000 of them actually were arrested and imprisoned for varying periods of time pending release on bail. Later 762 were ordered deported from the country. Warrants were cancelled by the Secretary of Labor for 1293

persons and the remaining 1,000 are probably still awaiting final disposition of their cases, most of them being on bail. It is to be noted that the warrant was issued and bail fixed in every instance by a subordinate official of the Department of Labor without recourse to judicial process.

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The widespread public comment aroused by these wholesale arrests has unfortunately been centered on the acts of the individual officials responsible for them. This, coupled with the fact that owing to lack of public hearings it was generally believed that most of the persons arrested were guilty has obscured the real cause of this situation.

The real evil in the situation lies in the important fact that we have on our statute books laws which make possible the acts of the officials referred to. It is on this point that we as lawyers should focus the attention of the public. Possibly the Department of Justice was justified in asking for these indiscriminate arrests even upon insufficient evidence; perhaps on the other hand Assistant Secretary Post in reviewing the arrests was justified in cancelling most of the warrants and declaring that the arrests in those cases should not have been made; but the significant fact, I repeat, is that the procedure, legally authorized by the present deportation law, is flatly at variance with American standards of judicial process.

This procedure grew up under the early immigration statutes which were mainly concerned with turning back immigrants at the borders of the country. And although later Congress made it possible to deport anarchists and a limited class of undesirables subsequent to their entry into the country the procedure applied in only a limited number of cases and received little public attention. With the passage by Congress of the Act of October, 1918, however, Congress departed from the old standards and embarked upon a distinct change of policy. This statute passed during the war provided for the expulsion not only of an anarchist but the expulsion also of alien members of certain organizations entertaining belief in, teaching and advocating the overthrow of government by violence, etc. One of the inducements for the enactment of this law was the critical emergency of the war, particularly because of disturbances resulting from activities of alien members of the I.W.W. in the far Northwest which seemed to lie outside the reach of the espionage act. It is doubtful whether its framers ever intended anything beyond a limited use of the powers conferred and it was commonly supposed at the time that the requirements for the issue of a warrant by the Secretary of Labor gave to that official wide discretion and that it was not mandatory upon him to issue a warrant in all cases.

This statute was further amended by the enactment within the last month of the Act of June 5, 1920, passed with the avowed intention of limiting the discretion of the Secretary of Labor and forcing him to deport classes of aliens greatly broadened over the earlier categories.

The most noteworthy amendment by this new statute was the addition of

the section which provided in substance for the expulsion of aliens who are members of or affiliated with any organization, association, society or group. . . .that has in *its possession* for the purpose of circulation, distribution, publication, issue *or display* any written or printed matter, advising, advocating or teaching the opposition to all organized government, the overthrow by force, violence of the government of the United States and of all forms of law, or the duty, necessity or propriety of the unlawful assaulting or killing of any government officials or the unlawful destruction of property or sabotage.

. . . It is not too much to say that this particular provision of the statute carries the doctrine of constructive knowledge and imputed guilt far beyond any view hitherto entertained by an American court or legislative body and presents a distinct anomaly in our jurisprudence. Notwithstanding our present general distrust of aliens do we wish to make such a sacrifice of principle in favor of new policies of administrative law? . . . Under this statute it is not a judicial official but a sub-ordinate administrative official of the Department of Labor who for reasons, not necessarily proof, satisfactory to him authorizes the seizure and imprisonment of the alien, gives him a private hearing and makes a final decision upon the law and facts resulting it may be in the banishment for life of the alien from this country. Your attention is particularly directed to the fact that this administrative official in making his final decision decides on a typewritten record first the question of whether the alien was in fact a member of a prescribed group and secondly whether the printed literature seized falls within the scope of the seditious literature vaguely described by the statute.

. . . We are not here criticizing the rulings made in this class of cases by the Department of Labor but the system of non-judicial process here provided. The Secretary of Labor has declared over his own signature that in his opinion this process of deportation properly belongs to the judicial and not the administrative branch of the government. The last Congress, however, emphatically disagrees with this view and its action in depriving accused aliens of constitutional protection was deliberate and emphatic.

In testifying before the House Committee, Assistant Secretary Post, who had made the official rulings in all of these deportation cases, admitted that in cases of aliens who had been long in the country and who had American children he had exercised his discretion to give them the benefit of a reasonable doubt. It was made clear to him by at least one member of the Committee that he had no right to do this. Furthermore, Congressman Johnson of Washington, Chairman of the House Committee, in presenting this Bill to the House said in part:

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> . . . Those who apply to deportation cases the doctrine of reasonable doubt or the constitutional rights of accused persons, recognized in criminal courts, are in error. Deportation proceedings are not criminal proceedings and they can be reviewed only by the civil proceeding of habeas corpus. The courts will not reverse or

> annul the decision of an administrative board or authority under the executive department unless the proceeding was without jurisdiction or clearly in contravention of law. An alien's domicilling himself in this country is merely the exercise of a privilege. He is usually here under the provisions of a treaty giving to the nationals of this country the same rights and privileges as are accorded those of the most favored nation. He has no constitutional right to stay here for which he can claim the protection of a jury trial. *All that talk about reasonable doubt is mere subterfuge.*

Viewing this measure in the large, taking into account the hearings which were had and the above formal declaration of the Chairman of the Committee which reported it we find ourselves confronted not with the adventitious view of one or more isolated public officials; on the contrary we are face to face with the fact that the Congress of the United States deliberately and intentionally has inaugurated a set policy applicable to all aliens whose conduct in the view of an administrative official fails to conform to the standards laid down by Congress.

Consideration of this extraordinary statute raises two distinct questions. First, the wisdom of the enactment and secondly, the nature of the procedure provided for the enforcing of this law. . . .

One feature of this law presenting an anomaly in our jurisprudence is the abandonment of the doctrine of personal guilt unless it can be claimed that affiliation with a group holding seditious ideas without overt act by the participant constitutes personal guilt. It was on this phase of the law that Bishop Brent, champion of liberty quoted the old saw, "Give a dog a bad name and hang him." But this important phase of the general discussion also I leave to others.

What I desire to draw especially to your attention is the deeper phases of the matter, the abandonment, deliberate and intentional, by Congress of legal process and of American settled habits of judicial procedure. For in these deportation cases the procedure itself imperils the substantive rights of the individual. Are we not by acquiesing in this law confessing to a distrust of the judicial power?

In contemporary discussion, emphasis is continually and mistakenly laid on the *right* of the Federal Government to exclude and deport undesirable aliens; little or no attention is paid to considerations of simple justice in connection therewith. For example, controversalists are continually reiterating that under the rulings of the Supreme Court this government had an inalienable right, inherent in its sovereignty, to exclude or expel aliens; that immigration hearings are summary proceedings,–not criminal trials; that the doctrine of reasonable doubt is not deprivation of property without due process of law; that the constitutional guaranties of the right to trial by jury, etc., have no application to these proceedings; and substantially that the right to a fair hearing is practically the only right to which an alien is entitled or ought to be entitled.

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Because of an early declaration by the Supreme Court that the right to expel was the one and the same power with the right to exclude, Congress has assumed that no distinction could be made between these two powers and that an alien might be expelled regardless of the length of his residence, his property rights and the state of his family. Perhaps this is true but the Supreme Court has not yet declared it to be true. Those who uphold this broad contention might recall with profit the language used by Mr. Justice Field in the case of Wong Wing vs. the United States. In that case concurring with the Court in declaring unconstitutional a provision of law by which a United States Commissioner was empowered to sentence to imprisonment a Chinaman found unlawfully in the country, he said:

> The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the Bar—in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws. Far nobler was the boast of the great French Cardinal who exercised power in the public affairs of France for years, that never in all his time did he deny justice to any one. 'For fifteen years,' such were his words, 'while in these hands dwelt empire, the humblest craftsmen, the obscurest vassal, the very leper shrinking from the sun, though loathed by charity, might ask for justice.'
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> It is to be hoped that the poor Chinamen, now before us seeking relief from cruel oppression, will not find their appeal to our republican institutions and laws a vain and idle proceeding.

* * *

When the framers of the Federal Constitution provided by constitutional guarantees for the protection of every person charged with crime, whether citizen or alien, could they have intended that in future days thousands of aliens should be subject to loss of property rights and banishment by decision of a single administrative official of a Federal Department? Legalists may justify this summary procedure, but it is a denial of uniform justice for which, unless remedied, the nation will eventually pay a heavy penalty. Nothing so quickly undermines public confidence in government as the exercise of arbitrary power. Arrogance in a nation is as serious a moral defect as it is in an individual. The present method of enforcing the deportation of aliens by executive decisions, without any real forum or tribunal discredits American standards of justice and older standards of honest fair play. We are forgetting that the old phrase "The law of the land," now nearly 800 years old, in our jurisprudence, implied common and impartial justice. Undoubtedly there are in this country many aliens who ought not to be here and who should be deported. But even if this is so, and even if an alleged emergency exists by reason of a concerted conspiracy against this government,

we, as lawyers, should have no patience with the clamour of the crowd demanding the abandonment of customary and ordinary procedure under our standards of judicial process. The Americans cannot afford to be unjust.

* * *

Administrative government is not responsible government; every attempt to enlarge its scope should be viewed with jealous scrutiny. Representative government is not so old nor so stable an institution in organized society that we can afford to tolerate influences antagonistic to it. Permanence of representative government depends upon every citizen feeling a proprietary interest in his government and feeling absolute confidence in the administration of equal rights thereunder. Any political concept, any form of institution or type of administration which obscures this sense of proprietorship by the citizen constitutes a direct menance to the government itself. Obedience to law and acquiescence in the demands of public opinion are one thing. Indifference is quite another. In this republic stability of government depends entirely upon the activity and confidence of alert minded citizens, indifference is the constant menace to its safety.

. . . It is not the work, the zeal or the errors of public officials now in office that matters so much; it is the fact that without remonstrance we are tolerating practices and lending the countenance of approval to theories of law which in the long run can only have the result of undermining the judicial power,—the last repository of the liberties of the Americans.